

**SANITIZED DECS. – 03-689 C & 03-690 U – BY GEORGE PIPER – SUBMITTED
FOR DECISION ON BRIEFS 10/08/04 – ISSUED 10/12/04**

SYNOPSIS

CONSUMERS’ SALES AND SERVICE TAX -- BURDEN OF PROOF NOT MET -- W. Va. Code § 11-10A-10(e) places the burden of proof upon the Petitioner to show that the assessment is incorrect and contrary to law, in whole or in part, and the failure to do so mandates that the assessment be upheld *in toto* notwithstanding Petitioner’s conjecture that the assessment could have been more exact.

PURCHASERS’ USE TAX -- BURDEN OF PROOF NOT MET -- Failure to show at hearing that certain purchases were not subject to use tax leaves the trier of fact no alternative but to uphold the assessment in its entirety. W. Va. Code § 11-10A-10(e).

FINAL DECISION

A tax examiner with the Field Auditing Division (“the Division”) of the West Virginia State Tax Commissioner’s Office (“the Commissioner” or “the Respondent”) conducted an audit of the books and records of the Petitioner, Thereafter, on October, 2003, the Director of this Division of the Commissioner’s Office issued a purchasers’ use tax assessment against the Petitioner. This assessment was issued pursuant to the authorization of the State Tax Commissioner, under the provisions of Chapter 11, Articles 10 and 15A of the West Virginia Code. The assessment was for the period of October, 1998 through June,

2003, for tax of interest, through October, 2003, and no additions to tax, for a total assessed liability. Written notice of this assessment was served on the Petitioner.

Also, on October, 2003, the Commissioner (by the Division) issued a consumers' sales and service tax assessment against the Petitioner, under the provisions of Chapter 11, Articles 10 and 15 of the West Virginia Code, for the period of January, 2000 through June, 2003, for tax of interest, through October, 2003, and additions to tax for a total assessed liability. Written notice of this assessment was served on the Petitioner.

Thereafter, by hand delivery on December, 2003, the Petitioner timely filed with this tribunal, the West Virginia Office of Tax Appeals, petitions for reassessment. *See* W. Va. Code § 11-10A-8(1) [2002].

Subsequently, notice of a hearing on the petitions was sent to the Petitioner and a hearing was held in accordance with the provisions of W. Va. Code § 11-10A-10 [2002] and 121 C.S.R. 1, § 61.3.3 (Apr. 20, 2003).

FINDINGS OF FACT

1. Petitioner is an "S" corporation consisting of an 01 account, which is a convenience store located in West Virginia, and an 02 account, which is a retail liquor store located in downtown West Virginia.
2. The auditor determined the amount of liquor sales based upon the liquor/wine distribution returns filed by the Petitioner. (Tr. 14, 15 and State's Ex. No. 8).
3. The Petitioner did not report any sales to private clubs during the audit period. (State Ex. No. 8).

4. The auditor was able to determine the amount of liquor purchased based upon the bank statements provided to the Respondent. (Tr. 13-16).
5. The auditor performed a recap of the liquor purchases versus the reported liquor sales (Tr. 12-18).
6. The auditor determined that the reported sales were less than the liquor purchases. (Tr. 16).
7. The auditor inquired of the Petitioner's CPA about the beer purchases for the liquor store. (Tr. 17).
8. The auditor was concerned that the Petitioner did not show any cash purchases for beer and requested that the accountant obtain the beer purchase history for the liquor store from the wholesalers. (Tr. 17 and State's Ex. No. 9).
9. The auditor reviewed the purchase history with some invoices for beer purchased from the wholesaler and determined that some purchases were not included in the purchase history. These were cash purchases of beer made by the Petitioner. (Tr. 18).
10. The Petitioner also purchased beer from another business in the area and the auditor obtained invoices for the month of May, 2002, which were used to project average monthly purchases.
11. The Petitioner reported pursuant to the West Virginia Liquor/Wine Distribution return that it sold liquor for the year 2000. (Tr. 23).
12. The Petitioner reported pursuant to West Virginia Liquor/Wine Distribution return that it sold liquor for the year 2001. (Tr. 23).

13. The Petitioner reported pursuant to West Virginia Liquor/Wine Distribution return that it sold liquor for the year 2002. (Tr. 23).
14. The auditor determined that the liquor purchases for the year 2000 were based upon the debits made to the Petitioner's bank statements. (Tr. 23).
15. The auditor determined that the liquor purchases for the year 2001 were determined by the debits made to the Petitioner's bank statements. (Tr. 23).
16. The auditor determined that the liquor purchases for the year 2002 were as determined by the debits made to the Petitioner's bank statements.
17. Based upon inaccuracies in Petitioner's tax reporting, the auditor attempted to determine the estimated liquor sales by using a 1.50 gross markup of the purchases. (Tr. 24).
18. The auditor determined the total wine purchases for the year 2000-2001 (Tr. 24).
19. To determine the total wine sales the auditor multiplied the total purchases by a 1.25 gross percentage markup. (Tr. 26).
20. To determine the total beer purchases the auditor took the purchase history from Bottling Company and added an additional 5% for cash purchases and per month of beer purchases from (Tr. 26).
21. The auditor determined the gross sales price of beer by multiplying the purchases by 1.25.
22. The records of the Petitioner were not adequate to reflect the business operations of the taxpayer. (Tr. 35, 45).
23. The auditor determined that the best information available was the various purchase histories and the actual invoices provided.

24. The auditor asked for any and all information concerning markups and actual sales by the liquor store and none were provided. (Tr. 35).
25. The Petitioner's only fact witness testified that the purchases of liquor exceeded the reported sales of liquor during the audit period. (Tr. 169-172).
26. The Petitioner was not able to provide any evidence as to the average markup on any of the beer sold at the liquor store during the audit period. (Tr. 173).
27. Petitioner did not have any evidence of the actual amount of beer purchased on office tickets and the same was therefore not reflected in the purchase detail for Bottling Company. (Tr. 177).
28. The Petitioner did not present evidence showing how much beer was purchased from (Tr. 179-180).
29. The Petitioner did not present evidence to show what the markup was for wine sales. (Tr. 180-181).
30. The Petitioner did not present evidence concerning the amount of soft drinks sales during the audit period. (Tr. 182).
31. The Petitioner did not present evidence concerning the actual markup of liquor sales.
32. The expert witness for the Petitioner testified that his starting point of an audit would be to analyze any representations made by the Taxpayer, to-wit, sales tax returns and other tax returns. (Tr. 237-239).
33. The auditor reviewed the sales tax returns. (Tr. 10-29).
34. The expert witness testified that the second step of an audit should have been a review of other tax returns. (Tr. 329).

35. The auditor reviewed other tax returns. (Tr. 10-29).
36. The expert witness testified that the third step of an audit should have been a review of third party data, such as, bank statements. (Tr. 241).
37. The auditor reviewed the bank statements. (Tr. 10-29).
38. The expert witness testified that once it was determined that the actual purchases were greater than reported sales the auditor should have sat down and talked with the accountant and reviewed that information.
39. The auditor met with the CPA after the auditor determined actual purchases exceeded reported sales.
40. Petitioner's expert witness testified that the audit prepared by procedure up to the point of meeting with the auditor did not deviate from his opinion of what the auditor should do for the sales tax audit. (Tr. 250).
41. Petitioner's expert witness testified that in a sales tax audit when its been determined that there is problem with the reported sales that the next best available information to use to try to determine taxable sales is the purchases. (Tr. 252).
42. The expert witness testified that he agreed with the accuracy of the amount of purchases obtained by the auditor. (Tr. 253).
43. The expert witness testified that based upon the testimony, the sales figures reported by the Petitioners were not true and accurate. (Tr. 269).
44. The expert witness agreed with the auditor that the records were inadequate to accurately reflect the business operations of the Petitioner and that the auditor should proceed to an indirect method of determining the actual sales. (Tr. 272).

45. The expert witness testified that in his opinion, the information provided by the Petitioner and the testimony rendered during the hearing indicated Petitioner had not remitted all sales tax collected.
46. The expert witness did not present any evidence or calculations of the amount of the underpayment.
47. The expert witness' only objection to the indirect method used by the auditor was the use of the markup on purchases.
48. The use tax assessment was based upon equipment purchases and contract labor. (Tr. 92).
49. The auditor determined that the equipment purchases were based upon a depreciation schedule. (Tr. 92).
50. Petitioner failed to introduce any credible evidence to show that the use tax assessment on the 001 account should not be affirmed.

DISCUSSION

The only issue is whether the Petitioner has carried its burden of proof showing that the assessments were incorrect and contrary to law, in whole or in part.

A good starting point is the audit itself which was clearly predicated upon the fact that the Petitioner's own tax records were less than satisfactory. (Petitioner's witnesses did not dispute that finding).

West Virginia Code § 11-10-5a authorizes the inspection or auditing of the taxpayer's book and records to ascertain the correctness of any tax return or assessment. The most direct method of ascertaining the accuracy of any tax return is a review of the actual sales source documents.

In this case the tax auditor determined that the reported sales of liquor were actually less than the actual purchases of liquor and, therefore, he made the determination that the sales records would not accurately reflect the business operation.

"If records are inadequate to accurately reflect the business operations of the taxpayer, the auditor will determine the best information available and will base the audit report on that information." West Virginia C.S.R. 110-15-14b.4.

Based upon the foregoing, it is clearly reasonable that Respondent would use Petitioner's purchase history and then extrapolate same to calculate the amount of sales to determine the amount of consumers' sales and service tax due. The auditor then deducted the amount of consumers' sales and service tax remitted to determine the amount of the underremittance of tax.

It should be noted that both the auditor and (Petitioner's expert) testified that the records as filed did not accurately reflect the business operation of the business and that the best available information would be the purchase detail which the auditor did use.

The Respondent performed a proper audit pursuant to the aforecited statute and applicable regulation. West Virginia Code § 11-10A-10(e) places the burden of proof upon the Petitioner to show that the assessments were incorrect and contrary to law, in whole or in part. *See also* C.S.R. 121-1-62.

In this case, (Petitioner's expert) testified under cross-examination that Petitioner failed to collect or to remit all the consumers' sales and service tax due, no one presented any testimony concerning what part of the assessment was incorrect. The Petitioner then failed to present any evidence as to the amount of underpayment of tax, other than to make generalized statements that the assessment was too high.

After the determination that the reported sales figure was not reliable, the best available information to determine the underpayment was using an indirect method derived from the use of the purchase history. The parties agreed that the amount of the purchases used by the auditor for this purpose was accurate.

The only real area of contention at the hearing was the use of the gross mark-up by the auditor for liquor and for beer and wine. (Petitioner's expert) testified about the mark-ups used by the IRS (1.292), the census bureau (1.359), etc. However, no one ever proved what the actual mark-ups were for, meaning the items which Petitioner sold.

In summary, Petitioner never proved any part of its case, and only alleged that the auditor could have done a better job when presented with Petitioner's poor tax and business records, which it (Petitioner) never rehabilitated at the hearing, including the disturbing revelation that its purchases of liquor/wine exceeded the sales of same.

Failure by the Petitioner to prove at the hearing what the correct amount of any tax assessment should be never shifts the burden of proof to the Respondent to prove that the tax assessments should have been more exact, because to do so would make a mockery of any burden of proof requirement.

In his memorandum of argument Petitioner's counsel did not address the purchasers' use tax assessment; however, because no evidence was presented at hearing to challenge same, the burden of proof requirement is again lacking.

CONCLUSIONS OF LAW

Based upon all of the above it is **HELD** that:

1. In a hearing before the West Virginia Office of Tax Appeals on a petition for reassessment, the burden of proof is upon a petitioner-taxpayer, to show that the assessment is incorrect and contrary to law, in whole or in part. *See* W. Va. Code § 11-10A-10(e) [2002] and 121 C.S.R. 1, § 63.1 (Apr. 20, 2003).

2. The Petitioners-taxpayers in this matter has failed to carry this burden of proof as to either assessment. *See* 121 C.S.R. 1, § 69.2 (Apr. 20, 2003).

DISPOSITION

WHEREFORE, it is the **FINAL DECISION** of the **WEST VIRGINIA OFFICE OF TAX APPEALS** that the purchasers' use tax assessment issued against the Petitioner for the period of October, 1998 through June, 2003, for tax interest and no additions to tax, should be and is hereby **AFFIRMED**.

Pursuant to the provisions of W. Va. Code § 11-10-17(a) [2002], **interest accrues** on this purchasers' use tax assessment until this liability is fully paid.

It is **ALSO** the **FINAL DECISION** of the **WEST VIRGINIA OFFICE OF TAX APPEALS** that the consumers' sales and service tax assessment issued against the Petitioner for the period of January, 2000 through June, 2003, for tax, interest and additions to tax should be and is hereby **AFFIRMED**.

Pursuant to the provisions of W. Va. Code § 11-10-17(a) [2002], **interest accrues** on this consumers' sales and service tax assessment until this liability is fully paid.

APPEAL PROCEDURES

If an aggrieved party wishes to appeal this Final Decision to an appropriate West Virginia circuit court, W. Va. Code § 11-10A-19(a), as last amended, sets forth that such an appeal must be filed within sixty (60) days after the date of service of this Final Decision upon the party. W. Va. Code § 11-10A-19, as last amended, sets forth the outline for the procedure for the appeal to circuit court (an appeal petition filing fee is normally required), including, in most cases, filing an appeal bond by a taxpayer. Under W. Va. Code § 11-10A-19(b), as last amended, the West Virginia Office of Tax Appeals (or one or more of its administrative law judges), as a totally independent, quasi-judicial tribunal, is not a party to the appeal and is not to be named as a party to the appeal.

On the other hand, under W. Va. Code § 11-10A-19(f), as last amended, and under W. Va. Code § 29A-5-4(b), as last amended, to provide the record to the circuit court, the

appellant to the circuit court is to provide the West Virginia Office of Tax Appeals (as well as the other party to the appeal, that is, the State Tax Commissioner’s Office or the Taxpayer) with a certified copy of the filed petition for appeal (showing the circuit court in which the petition was filed, the date filed, and the “civil action number” for the appeal from an administrative agency), along with a certified copy of any order filing the petition or of any other initial process document setting forth the directives of the court with respect to processing the appeal.

Within fifteen (15) days after receipt of this written notice of the appeal, or within such further time as the circuit court may allow, the West Virginia Office of Tax Appeals, pursuant to the provisions of W. Va. Code § 29A-5-4(d), as last amended, will prepare and transmit to the circuit court a certified copy of the entire record in the matter.

As set forth in W. Va. Code § 11-10A-14(c) [2002] and 121 C.S.R. 1, § 86 (Apr. 20, 2003) (Rules of Practice and Procedure before the West Virginia Office of Tax Appeals), the West Virginia Office of Tax Appeals will: (1) send to the parties a detailed index of the record at the same time it transmits to the circuit court a certified copy of the entire record, § 86.4; (2) at the same time send to the appellant(s) a bill (payable to the “State of West Virginia”), due within twenty (20) calendar days, for the reasonable costs of preparing the record, § 86.3; and (3) upon payment of such record preparation costs, send to the parties a certified copy of the entire record.
